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Supreme Court, U.S.
FILED
MAY 5 1998
CLERK

No. 97-1435

In the Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET DONG, PETITIONER

v.

SMITHSONIAN INSTITUTION, HIRSHHORN MUSEUM AND SCULPTURE GARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Smithsonian Institution is "an authority of the Government of the United States," 5 U.S.C. 551(1), and is thus an "agency" subject to the provisions of the Privacy Act, 5 U.S.C. 552a.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Armstrong v. *Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997)	5, 9, 13
California v. *Mead*, 618 F.2d 618 (9th Cir. 1980)	7
Cotton v. *Heyman*, 63 F.3d 1115 (D.C. Cir. 1995)	8, 13
Davis v. *United States*, 417 U.S. 333 (1974)	8
Department of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)	2
Energy Research Found. v. *Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990)	10, 11-12
Expeditions Unlimited Aquatic Enters., Inc. v. *Smithsonian Inst.*, 566 F.2d 289 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978)	8
Forsham v. *Harris*, 445 U.S. 169 (1980)	7, 12, 13
Genson v. *Ripley*, 681 F.2d 1240 (9th Cir.), cert. denied, 459 U.S. 937 (1982)	6-7
Irwin Mem'l Blood Bank v. *American Nat'l Red Cross*, 640 F.2d 1051 (9th Cir. 1981)	10
Kissinger v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)	7
Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995)	11
Magruder v. *Smithsonian Inst.*, 758 F.2d 591 (11th Cir. 1985)	6

Cases—Continued: Page

Meyer v. *Bush*, 981 F.2d 1288 (D.C. Cir. 1993) 5, 9, 10, 11
Pacific Legal Found. v. *Council on Envtl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980) 11
Public Citizen Health Research Group. v. *Department of Health, Educ. & Welfare*, 668 F.2d 537 (D.C. Cir. 1981) 8
Renegotiation Bd. v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974) 7
Rocap v. *Indiek*, 539 F.2d 174 (D.C. Cir. 1976) 12
Rushforth v. *Council of Econ. Advisers*, 726 F.2d 1038 (D.C. Cir. 1985) 5-6, 9, 10
Soucie v. *David*, 448 F.2d 1067 (D.C. Cir. 1971) 9, 11
Washington Research Project, Inc. v. *Department of Health, Educ. & Welfare*, 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975) 9, 10

Statutes and regulations:

Federal Tort Claims Act, 28 U.S.C. 2671 8
Privacy Act, 5 U.S.C. 552a:
5 U.S.C. 552a .....
5 U.S.C. 552a(a)(1) 2
5 U.S.C. 552a(a)(4)(B) .....
5 U.S.C. 552a(a)(5) 2
5 U.S.C. 552a(e) 2
5 U.S.C. 552a(e)(2) 2, 4
5 U.S.C. 552a(g)(4) 3
5 U.S.C. 552a(g)(5) 7
5 U.S.C. 551(1) 2, 4, 5, 9, 11
5 U.S.C. 552(a)(4)(B) 7
5 U.S.C. 552(e) 2
5 U.S.C. 552(f) 2, 4, 5
5 U.S.C. 552(f)(1) 2
20 U.S.C. 41 10
20 U.S.C. 78 6

Statutes and regulations—Continued: Page

20 U.S.C. 79 6
40 U.S.C. 193n-193x 11
36 C.F.R.:
Sections 504 *et seq.* 11
Section 520.16 11

Miscellaneous:

1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* (3d ed. 1994) 10
J. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 Pa. L. Rev. 1 (1970) 10
H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 125 F.3d 877. The opinion of the district court (Pet. App. 14a-30a) is reported at 878 F. Supp. 244.

JURISDICTION

The court of appeals entered its judgment on October 17, 1997. Pet. App. 37a-38a. A petition for rehearing was denied by the court of appeals on December 3, 1997. Pet. App. 33a-34a. The petition for a writ of certiorari was filed on March 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act delineates a number of data collection, processing, and disclosure requirements for "[e]ach agency that maintains a system of records" about individuals. 5 U.S.C. 552a(a)(5), 552a(e); see generally *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 766-767 (1989). One requirement is that such agencies

> collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.

5 U.S.C. 552a(e)(2).

The Privacy Act identifies the "agenc[ies]" subject to its provisions by incorporating the definition of "agency" contained in the Freedom of Information Act (FOIA). 5 U.S.C. 552a(a)(1), 552(f).[1] FOIA, in turn, defines a covered "agency" in the following terms:

> [T]he term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. 552(f)(1). Section 551(1), which is part of the Administrative Procedure Act (APA), further

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[1] The Privacy Act actually refers to "agency as defined in section 552(e) of this title." 5 U.S.C. 552a(a)(1). Section 552(e), however, was subsequently redesignated Section 552(f).

provides that "agency" means "each authority of the Government of the United States."

The Privacy Act renders the United States liable for civil damages if an agency intentionally or willfully violates the Act's terms. 5 U.S.C. 552a(g)(4).

2. Petitioner has been employed by the Smithsonian Institution's Hirshhorn Museum and Sculpture Garden (Smithsonian) since 1985. Pet. App. 2a. As part of her job, she serves as a courier for works of art that the Smithsonian lends to other museums. *Ibid.* The Smithsonian requires that employees like petitioner receive permission before acting as a courier.

In September 1993, petitioner "deliberately failed to request approval" before serving as a courier for a painting that was being shipped to the Museum of Modern Art in New York City. Pet. App. 2a. Petitioner claimed that she did not seek advance authorization because she wished "to avoid friction with a co-worker, who in her view made trouble when [petitioner] was away on courier duty." *Ibid.*

When word of petitioner's unauthorized trip reached her superiors, they sought confirmation from the registrar and another employee at the Museum of Modern Art. Pet. App. 2a-3a. Petitioner's supervisors explained that they sought to substantiate the rumors of petitioner's violation in this manner "because they were aware of tensions in the Hirshhorn office where [petitioner] worked, and wanted to put the rumors to rest without creating any additional workplace difficulties." *Id.* at 3a. Once confronted with the information, petitioner admitted taking the trip and received a five-day suspension. *Ibid.*

3. In March 1994, petitioner filed suit against the Smithsonian, claiming that the failure to seek confirmation of the trip directly from her violated the Privacy Act, 5 U.S.C. 552a(e)(2). The Smithsonian defended, in part, on the ground that it is not an "agency" subject to the Privacy Act. Pet. App. 3a. The district court ruled that the Smithsonian is a covered agency under the Privacy Act. *Id.* 3a, 16a-30a.[2]

4. The court of appeals reversed. Pet. App. 1a-13a. The court ruled that the Smithsonian is not an "authority of the Government of the United States" under 5 U.S.C. 551(1), as incorporated into 5 U.S.C. 552(f). The court of appeals explained that, although the Smithsonian has some connections to the federal government, the definition of agency under the Privacy Act (as incorporated from the APA) requires an exercise of "substantial independent" governmental authority. Pet. App. 8a, 9a. "[A]n entity may be deeply entwined with the federal government without being an 'authority of the Government of the United States.'" *Id.* at 8a. The court noted that the exercise of governmental authority under the Privacy Act and the APA is ordinarily characterized by the power to take final and binding action affecting the rights and obligations of individuals, and typically occurs through the procedures of rulemaking and

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[2] The Smithsonian also contended that, given its reasonable belief that it was not subject to the Privacy Act, damages were unavailable because the supervisors' actions were neither intentional nor willful. Additionally, the Smithsonian argued that the intra-office tension justified the initial failure to confront petitioner directly. Pet. App. 3a. The court of appeals did not address either of those issues, and petitioner does not raise them in her certiorari petition.

adjudication. *Id.* at 7a-13a. The Smithsonian, however, "does not make binding rules of general application or determine rights and duties through adjudication." *Id.* at 11a. Nor, the court of appeals continued, does the Smithsonian issue orders or perform any regulatory functions. *Ibid.* The court concluded that, "[t]o the extent the Smithsonian exercises anything approaching public authority, that authority appears to be entirely ancillary to its cultural and educational mission." *Id.* at 12a (footnote omitted).[3]

ARGUMENT

The court of appeals held in this case, as it had ruled in previous cases, that an entity must exercise "substantial independent authority" before it will qualify as an "authority of the Government of the United States" within the meaning of 5 U.S.C. 551(1). Pet. App. 9a.[4] Petitioner does not dispute that the

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[3] The court of appeals also concluded that the Smithsonian is not an "establishment in the executive branch," within the meaning of 5 U.S.C. 552(f), because (i) its Board of Regents is composed principally of persons drawn from outside the Executive Branch, (ii) it is not answerable to the President, and (iii) it does not engage in typical Executive Branch activities. Pet. App. 5a. The court of appeals likewise determined that the Smithsonian does not qualify as a "Government controlled corporation" under Section 552(f), because that definition applies only where the corporation is also an "establishment in the executive branch." Pet. App. 5a-7a. Petitioner does not challenge either of those aspects of the court of appeals' ruling. See Pet. 14 n.4.

[4] See also *Armstrong* v. *Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997); *Meyer* v. *Bush*, 981 F.2d 1288, 1292-1293 (D.C. Cir. 1993); *Rushforth* v. *Council of Econ. Advisers*, 762 F.2d 1038, 1042-1043 (D.C. Cir. 1985); *Soucie* v. *David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

court of appeals' "substantial independent authority" test represents the correct legal standard for deciding whether the Smithsonian is an "authority of the Government of the United States." Petitioner disagrees only with the court of appeals' application of that correct legal test to the specific facts of this case. See Pet. 16-17, 23-28 (arguing that the Smithsonian does exercise substantial and independent governmental authority). That disagreement presents no issue of broad importance that warrants an exercise of this Court's certiorari jurisdiction. Because the court of appeals' decision is correct and consistent with the decisions of this Court and of other courts of appeals, the petition for a writ of certiorari should be denied.

1. The decision of the court of appeals does not conflict with the ruling of any other court of appeals. To the contrary, the court's ruling is the first appellate decision to address whether the Privacy Act applies to the Smithsonian.

While petitioner is correct (Pet. 29-30) that the majority of litigation against the Smithsonian is likely to arise within the District of Columbia Circuit, the Smithsonian does operate and have facilities outside the District of Columbia. See, *e.g.*, 20 U.S.C. 78, 79. Litigation involving the Smithsonian thus does arise within other circuits. See, *e.g.*, *Rivera* v. *Heyman*, No. 97-9316 (2d Cir.) (pending) (applicability of Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act to the Smithsonian); *Magruder* v. *Smithsonian Inst.*, 758 F.2d 591 (11th Cir. 1985); *Genson* v. *Ripley*, 681 F.2d 1240 (9th Cir.), cert. denied, 459 U.S. 937 (1982); *California* v. *Mead*, 618 F.2d 618 (9th Cir. 1980). The Privacy Act's venue provision, moreover, authorizes suit to be brought not

only in the District of Columbia, but also in the district in which the complainant resides or has its principal place of business, or in which the agency's records are located. 5 U.S.C. 552a(g)(5); see also 5 U.S.C. 552(a)(4)(B). The lack of a circuit conflict thus remains a relevant consideration in determining whether an exercise of this Court's certiorari jurisdiction is warranted.

2. Petitioner also fails to identify any conflict between the court of appeals' ruling and this Court's decisions. In fact, the court of appeals' requirement that the Smithsonian exercise substantial independent governmental authority is consonant with this Court's precedents. See *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (records produced by an individual who serves only as an assistant to the President are not "agency records" under FOIA); *Forsham* v. *Harris*, 445 U.S. 169, 178-182 (1980) (federal funding and supervision alone are insufficient to create an "agency" subject to FOIA); cf. *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 13-16 (1974) (because Congress denominated the Board an "agency," and the Board determines the rights of contractors through negotiations and the issuance of orders, the Board constitutes an "agency" within the meaning of FOIA).

3. Petitioner asserts (Pet. 25) that this Court's review is necessary because the court of appeals has "muddled" the definition of "agency" under the Privacy Act. That argument is mistaken. The court of appeals' decision is both correct and consistent with precedent. Indeed, the court of appeals' ruling in this case was foreshadowed by *Cotton* v. *Heyman*, 63 F.3d 1115 (D.C. Cir. 1995), in which the D.C. Circuit held that the Smithsonian acted reasonably in

assuming that it did not satisfy the FOIA definition of "agency." *Id.* at 1121-1123.

a. Given the "myriad organizational arrangements" Congress has employed in exercising its legislative power, *Cotton*, 63 F.3d at 1121, and the varied definitional language employed by Congress in laws that operate upon such federally created entities,[5] the court of appeals correctly has eschewed "bright line rules" and employed instead "a fact-specific functional approach," *ibid.*, to identifying APA, FOIA, and Privacy Act agencies. See also *Public Citizen Health Research Group* v. *Department of Health, Educ. & Welfare*, 668 F.2d 537, 543 (D.C. Cir. 1981) ("each arrangement must be examined in its own context"). Rather than "muddling" the law, as petitioner alleges, the decision below reflects a case-specific and careful application by the court of appeals of a consistent legal standard.[6]

Since *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971), the D.C. Circuit has consistently required that an entity exercise "substantial independent authority" before it will be deemed an "authority of

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[5] For example, while the court of appeals held that the Smithsonian is not an agency for purposes of the Privacy Act, it had previously ruled that the Smithsonian does fall within the more capacious definition of "Federal agency" contained in the Federal Tort Claims Act, 28 U.S.C. 2671. *Expeditions Unlimited Aquatic Enters., Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978).

[6] In any event, even if some disharmony did exist between the court of appeals' decisions, intra-circuit tensions rarely warrant an exercise of this Court's certiorari jurisdiction. Intra-circuit uniformity of law can be maintained by the court of appeals itself. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

the Government of the United States." *Id.* at 1073; see also *Armstrong* v. *Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997); *Meyer* v. *Bush*, 981 F.2d 1288, 1292-1293 (D.C. Cir. 1993); *Rushforth* v. *Council of Economic Advisers*, 762 F.2d 1038, 1042-1043 (D.C. Cir. 1980).

In this case, the court of appeals correctly concluded that the Smithsonian does not satisfy that settled standard. Pet. App. 8a-11a.[7] The nature of the governmental authority to which the Administrative Procedure Act refers in Section 551(1) is the exercise of governmental power—that is, the authority to take final and binding action affecting the rights and obligations of individuals. Pet. App. 8a-9a; see also H.R. Rep. No. 1980, 79th Cong., 2d Sess. 19 (1946); *Cotton*, 63 F.3d at 1122-1123 (appropriate inquiry is whether the entity "had any authority in law to make decisions"); *Washington Research Project, Inc.*, v. *Department of Health, Educ. & Welfare*, 504 F.2d 238, 248 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975). Typically, an authority of the Government of the United States exercises such power through the procedures of rulemaking and adjudication. See J. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 Pa. L. Rev. 1, 9 (1970) (cited in *Irwin Memorial Blood Bank* v. *American Nat'l Red Cross*, 640 F.2d 1051, 1053 (9th

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[7] As the court of appeals noted (Pet. App. 9a-12a), many of its earlier cases involved entities in the Executive Office of the President and thus focused on the "independent" prong of the test, while the present case primarily entailed an inquiry into whether the quantity and character of the Smithsonian's contacts with the federal government constitute a "substantial" exercise of governmental authority.

Cir. 1981)); 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 1.2, at 4 (3d ed. 1994); *Washington Research Project, Inc.*, 504 F.2d at 248 n.15.

The Smithsonian, however, "is a cultural and research institution, established in 1846 pursuant to a trust bequest of James Smithson, and dedicated to 'the increase and diffusion of knowledge among men.'" Pet. App. 11a (citing 20 U.S.C. 41). The Smithsonian neither promulgates rules of general application nor determines the rights of persons through adjudication. It issues no orders to the public or to other governmental bodies, nor does the Smithsonian review or evaluate the conduct and operations of others. It performs none of the regulatory functions that form the province of government agencies. Nor does it allocate federal money to private entities by determining the recipients of federal grants. *Id.* 11a-12a. See *Meyer*, 981 F.2d at 1292-1294 (Presidential Task Force on Regulatory Relief is not a FOIA agency because it exercises no delegated regulatory authority over other agencies); *Rushforth*, 762 F.2d at 1043 (Council of Economic Advisers is not a FOIA agency because "[i]t cannot fund projects * * * nor can it issue regulations for procedures" for entities within or outside the Executive Branch).[8]

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[8] Contrast *Energy Research Found.* v. *Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 582, 585 (D.C. Cir. 1990) (Board is a FOIA agency in part because it monitors and investigates atomic facilities, reviews and recommends standards governing such entities, and can impose reporting requirements on the Secretary of Energy); *Pacific Legal Found.* v. *Council on Envtl. Quality*, 636 F.2d 1259, 1262-1263 (D.C. Cir. 1980) (Council on Environmental Quality is a FOIA agency in part because it could issue guidelines and promulgate regula-

Petitioner is correct (Pet. 25-27) that the Smithsonian does have the authority to operate its own police force, 40 U.S.C. 193n-193x, to prohibit discrimination by Smithsonian personnel, 36 C.F.R. 520.16, and to regulate its own facilities, 36 C.F.R. 504 *et seq.* But such limited self-regulation with no discernible external regulatory impact on the public or other governmental bodies does not amount to an exercise of governmental authority of the sort contemplated by 5 U.S.C. 551(1). See *Meyer*, 981 F.2d at 1292. Most private museums hire protective police forces and regulate their own employees, buildings, and grounds. See Pet. App. 11a.

b. As this Court recognized in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), congressional intent controls the status of governmental entities "for purposes of matters that are within Congress' control—for example, whether [an entity] is subject to statutes that impose obligations or confer powers" such as the APA, the Privacy Act, and FOIA. *Id.* at 392. Petitioner can cite no evidence that Congress intended the Smithsonian to be subject to FOIA or the Privacy Act. By contrast, a number of the cases petitioner relies upon (Pet. 20-24) involve bodies for which Congress had evidenced their agency status. See *Energy Research Found.* v. *Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 582-583 (D.C. Cir. 1990) (because Congress deemed the Board an "establishment in the executive branch" in the legislation that created it, the court concluded that the Board is an "establishment in the executive branch"

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tions that bind other agencies); *Soucie*, 448 F.2d at 1075 (Office of Science and Technology is a FOIA agency "[b]y virtue of its independent function of evaluating federal programs").

for purposes of FOIA's agency definition); *Rocap* v. *Indiek*, 539 F.2d 174, 180 (D.C. Cir. 1976) ("the Corporation is expressly designated as an 'agency' ").[9]

c. Petitioner also urges (Pet. 18-23) that the Smithsonian is an authority of the government of the United States because it is subject to the day-to-day control of the federal government. Petitioner relies (Pet. 18) upon the fact that the Smithsonian's operations are largely financed with government funds and that its use of those funds is subject to some federal auditing requirements. But federal funding, and the audits that necessarily attend such money, do not amount to "extensive, detailed and virtually day-to-day supervision" by the federal government of the Smithsonian's operations. See *Forsham*, 445 U.S. at 180. Otherwise, private entities that rely on federal grants for their operations and that must satisfy the accounting requirements that accompany such grants would also be deemed agencies subject to FOIA and the Privacy Act. In *Forsham*, however, this Court held that federal grantees are not FOIA agencies. *Id.* at 179-181. Nor does congressional control over the salaries of Smithsonian employees or congressional action affecting the facilities and broad mission of the Smithsonian constitute "extensive, detailed, and virtually day-to-day supervision" by the federal government. *Id.* at 180; see also *Cotton*, 63 F.3d at 1122.

4. Finally, contrary to petitioner's argument (Pet. 15-17), this case presents no issue of broad or re-

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[9] Petitioner's extensive reliance (Pet. 20-22) on *Rocap* is further misplaced because *Rocap* construed the "Government controlled corporation" aspect of FOIA's agency definition, which petitioner admits is not at issue in this case. Pet. 14 n.4.

curring importance warranting an exercise of this Court's certiorari jurisdiction. Rather, the court of appeals' decision entailed a "fact-specific functional" inquiry, *Cotton*, 63 F.3d at 1121, into the Smithsonian's operations for purposes of the Privacy Act's particular definition of "agency." Where, as here, the court of appeals applied the correct legal test, the court's evaluation of whether a particular set of facts satisfies the relevant legal standard does not present the type of broad or substantial legal question that generally occupies this Court's certiorari jurisdiction. In an analogous case last term, for example, the Court declined to review the D.C. Circuit's decision holding that the National Security Council is not a FOIA "agency." See *Armstrong* v. *Executive Office of the President*, 117 S. Ct. 1842 (1997). An analysis of the Smithsonian's status, moreover, is unlikely to provide much guidance to courts for the disposition of future cases, because the Smithsonian performs a mission that differs in kind and in operational structure from that performed by any other governmental entity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1998